Supreme Court, U.S.
FILED

98 1566 MAR 29 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONALD E. CLAPPER,

Petitioner,

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRITT OF CERTIORARI

RECEIVED
MAR 30 1999
OFFICE OE THE CLERK
SUPREME COURT, U.S.

THOMAS J. GAGLIARDO
Counsel of Record
GAGLIARDO & ZIPIN
Attorneys for Petitioner
1010 Wayne Avenue, Suite 500
Silver Spring, MD 20910-5600
(301) 589-1900

152111

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

62pp

QUESTION PRESENTED FOR REVIEW

Does the First Amendment's Free Exercise of Religion Clause prohibit the enforcement of federal civil rights statutes and the adjudication of common law contract claims by elementary school teachers in religiously affiliated schools?

LIST OF PARTIES TO PROCEEDINGS IN THE COURT BELOW

Donald E. Clapper. Mr. Clapper was the plaintiff in the United States District Court for the District of Maryland, the Appellant in the United States Court of Appeals for the Fourth Circuit, and is the Petitioner herein.

Chesapeake Conference of Seventh-Day Adventists was the Defendant in the United States District Court, the Appellee in the United States Court of Appeals for the Fourth Circuit, and is the Respondent herein.

Lon Gruesbeck was dismissed as a defendant in the District Court and was not a party to the appeal. He is not a party to the matter *sub judice*.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
U.S. Constitutional and Statutory Provisions	2
Statement of the Case	3
Argument	6
Conclusion	13

TABLE OF CITED AUTHORITIES

	Page
Cases:	
DeMarco v. Holy Cross High School, 4 F.3d 166 (1993)	8, 9
EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981)	10
Gargano v. Diocese of Rockville Center, 80 F.3d 87 (1996)	9
Geary v. Blessed Virgin Mary Parish School, 7 F.3d 324 (1993)	10
Hernandez v. Commissioner, 490 U.S. 680 (1989)	8, 10
Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105, *reh. den.*, 404 U.S. 876 (1971)	8, 10
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979)	8,10
Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986)	5, 7
Weissman v. Congregation Share Emeth, 38 F.3d 1038 (1994)	11

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2403(a)	1
29 U.S.C. § 623(a)	2
29 U.S.C. § 623(a)(1)	1
29 U.S.C. § 623(a)(2)	1
42 U.S.C. § 2000-e(a)(1)	1
42 U.S.C. § 2000-e(a)(2)	1
42 U.S.C. § 2000e-2(a)	3
United States Constitution:	
First Amendment	i, 2, 5, 6, 7, 13
Rule:	
Federal Rule of Civil Procedure 12(b)(1)	5

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated And Decided December 29, 1998 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of Maryland Dated October 21, 1997 ..... 21a

Appendix C — Memorandum And Order Of The United States District Court For The District Of Maryland Dated August 13, 1997 ..... 24a

OPINIONS BELOW

The United States District Court for the District of Maryland issued an order and opinion in this case, bearing Docket No. CA-95-832-WMN on August 13, 1997. It is unpublished. The District Court issued a separate order and opinion, denying Petitioner's Motion for Reconsideration on October 21, 1997. It, too, is unpublished.

The United States Court of Appeals for the Fourth Circuit issued an opinion in this case, bearing Docket No. 97-2648, on December 29, 1998. The Court of Appeals mandate issued on January 20, 1999.

STATEMENT OF JURISDICTION

This is a petition for review of the opinion and order of the United States Court of Appeals for the Fourth Circuit which is dated December 29, 1998. This Court may assert jurisdiction pursuant to 28 U.S.C. § 1254(1).

Review of the opinion of the United States Court of Appeals for the Fourth Circuit involves the constitutionality of federal civil rights statutes, viz., 29 U.S.C. § 623(a)(1) and (2) (Age Discrimination in Employment Act — ADEA) and 42 U.S.C. § 2000-e(a)(1) and (2) (Title VII of the Civil Rights Act of 1964).

The requirements of 28 U.S.C. § 2403(a) may apply. The Clerk of the United States Court of Appeals, however, did not certify, this matter to the Attorney General of the United States; and the United States did not participate in the proceedings in either the District Court or the Court of Appeals.

A copy of this Petition, simultaneously with filing in this Court, has been served on:

Solicitor General of the United States
Room 5614
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001.

U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

29 U.S.C. § 623(a)

It shall be unlawful for an employer —

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would

> deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of his age.

42 U.S.C. § 2000e-2(a)

It shall be unlawful for an employer —

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner Donald E. Clapper was an elementary school teacher in the Seventh-Day Adventist School system for more than 25 years. From 1973 until 1993 he was employed by the Chesapeake Conference of Seventh-Day Adventists (hereafter "Conference") as a full-time teacher at various grade levels at Mount Aetna Academy. The terms and conditions of his

employment were set forth in a contract signed by Mr. Clapper and a representative of the Conference and which incorporated, *inter alia*, the "Employment Policies Manual for K-12 Educational Personnel of the Columbia Union Conference of the Seventh-Day Adventist Church" (hereafter "Employment Policies"). The Chesapeake Conference is a subordinate unit of the Columbia Union. Both the Conference and the Union are subordinate units of the North American Division of the General Conference of Seventh-Day Adventists.

In early 1993 it was decided that the number of teachers needed in the next school year would be reduced by one, and Mr. Clapper was selected as the teacher who would be terminated. He has not contested the right of Chesapeake Conference to conduct a reduction-in-force, i.e., to reduce the number of teaching positions at Mount Aetna. As the oldest teacher, and also one of the few with a masters' degree in elementary education, Mr. Clapper does contest (1) the proffered (and ostensibly pretextual) reason for selecting him as the sole teacher to be terminated; and (2) the subsequent failure to place him, as required by the Employment Policies, in another position at one of the other 17 elementary schools operated by the Conference.

Mr. Clapper finds further support for his contention in the undisputed fact that after it was announced that he would be terminated, two other teachers voluntarily resigned. With these resignations the workforce was reduced as the Conference had announced, and there was no longer a need to terminate Mr. Clapper.

After exhausting his administrative remedies with the U.S. Equal Employment Opportunity Commission, Mr.

Clapper brought a complaint (subsequently amended) alleging that he had been discharged from his employment because of his age (59 years old) and gender (male) in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, and in breach of his contract.

After full discovery and the rejection of its first motion to dismiss for failure to state a claim, the Conference filed a motion to dismiss pursuant to Rule 12(b)(1) asserting that the application of the ADEA and Title VII violated the First Amendment's Free Exercise of Religion Clause. The District Court granted the motion and the Court of Appeals affirmed. Both courts determined Mr. Clapper's position to be quasi-ministerial as that concept has been articulated by the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (1985).

Rayburn holds:

> As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy.

at 1169.

Although Mr. Clapper's duties were largely and primarily the same as a teacher in a secular or public elementary school, the Court of Appeals found a Constitutional imperative to exempt Mr. Clapper (and numerous similarly situated teachers) from federal civil rights statutes, which it premised on three points: (1) among the nine courses he taught, Mr. Clapper taught a course on the Bible and led students in brief

classroom prayers; (2) up to one-third of his salary could be subsidized by Tithing church members; and (3) two years before he was terminated and 25 years after he began teaching he was given a ministry of teaching credential — for which no special training, education or commitment or profession of faith was required.

No other federal Circuit Court of Appeals has formulated either a "primary duties test" or "quasi-ministerial exception" to exclude elementary school teachers from the coverage of federal civil rights statutes.

ARGUMENT

This case presents an opportunity to determine whether the First Amendment's Free Exercise of Religion Clause bars the application of federal anti-discrimination laws, as well as common law contract claims, to employees of religious institutions, particularly teachers in church-operated elementary schools. The resolution of this question may well affect thousands of individuals intended by Congress to be covered by federal civil rights statutes.

Petitioner Donald E. Clapper was employed for twenty years at Mount Aetna School, which was operated by Respondent Chesapeake Conference of Seventh-Day Adventists, and for seven additional years in other Seventh-Day Adventist elementary schools. He was terminated in a single-employee reduction-in-force when he was 59 years old. He filed suit alleging that his termination at Mount Aetna and the subsequent failure of Respondent to re-assign him at one of the other 17 schools it operated constituted violations of both the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 (gender), as well as, his contractual rights.

The United States Court of Appeals for the Fourth Circuit upheld the District Court of Maryland's order dismissing these claims, finding that enforcement of federal civil rights laws and Maryland common law would interfere with Respondent's free exercise of religion as guaranteed by the First Amendment.

Because Petitioner as an elementary school teacher had no sacerdotal functions, did not participate in matters of church governance or the definition of faith or morals, but instead was primarily charged with teaching the same courses as teachers in public and nonsectarian schools, there is no Constitutional imperative to deny him the protection of federal civil rights laws or the Maryland common law.

At least three federal Circuit Courts of Appeals (Second, Third, and Eighth) have held that the Free Exercise Clause does not prohibit the application of the Age Discrimination in Employment Act to the employer-employee relationship in religious institutions.

The Fourth Circuit, has allowed the ADEA to be enforced for the benefit of some employees of religious institutions, but has carved a substantial and ever-increasing area of exception.

In *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986), the Fourth Circuit articulated a "quasi-ministerial exception" and formulated a "primary duties" test to determine whether a nonordained position must be afforded the same Constitutional deference as that of an ordained minister. In the matter *sub judice*, it has relaxed that test and extended dramatically the breadth of its "quasi-ministerial exception" to elementary classroom teachers.

In this way, the Fourth Circuit has misused the Constitutional test formulated by this Court in, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105, *reh. den.*, 404 U.S. 876 (1971); *Hernandez v. Commissioner*, 490 U.S. 680, 104 L. Ed. 2d 766, 109 S. Ct. 2136 (1989) and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979), to diminish the protection of ADEA and Title VII. So too, the Fourth's Circuit's conclusion that employment decisions affecting elementary class room teachers are entitled to the same Constitutional abstinence afforded decisions affecting clergy stands in sharp contrast to that of at least three other circuits.

The Second Circuit held in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (1993) that enforcement of the Age Discrimination in Employment Act (ADEA) was routine regulatory interaction between government and a religious institution and reiterated this Court's declaration in *Hernandez v. Commissioner* (490 U.S. 680, 696-697 (1989)) that

> routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no "detailed monitoring and close administrative contact" between secular and religious bodies, does not in itself violate the nonentanglement command.

DeMarco was a lay teacher at Catholic high school with certain religious responsibilities, e.g., leading his students in prayer and taking them to Mass. Heightening the possibility of church-state conflict, the proffered reason for the personnel action taken against DeMarco was his alleged failure to carry out those religious duties. The Second Circuit, nonetheless,

found no risk of unconstitutional entanglement. The factual inquiry required by the ADEA is limited to determining whether the teacher was fired for discriminatory reasons rather than the failure to fulfill his religious obligations. No inquiry needs to be made about those religious obligations. As the Second Circuit said in *DeMarco*, this can be done without putting at issue the validity or truthfulness of dogma, belief or practice.[1]

In the matter *sub judice*, Petitioner was the sole person to lose his position in a reduction-in-force required by declining enrollment and budget. In the course of litigation an affidavit was submitted asserting performance was also a factor. (Appendix A, page 7.) At no time, however, has a religious reason ever been proffered.

The Fourth Circuit does not consider the reason for the employment action. Instead it focuses solely on whether or not the position in question is important to the Church (Appendix A, Page 11), and if it is, the Court will then extend the same Constitutional deference as that afforded ordained clergy.

> [W]e may not further inquire whether the reasons for the Chesapeake Conference's decisions not to renew Clapper's contract or transfer him to another elementary school within its jurisdiction, had some explicit grounding in theological belief.

Id.

---

1. *See also Gargano v. Diocese of Rockville Center*, 80 F.3d 87 (1996) upholding the right to bring a breach of contract claim by a teacher discharged ostensibly for failing to adequately prepare her students for the sacraments.

In other words, the Fourth Circuit, relying solely on the Church's self-serving declarations,[2] made a secular function — teaching elementary school — a sectarian function. And having done so, it simply refused to apply the test mandated by *Lemon*, *Hernandez* and *Catholic Bishop of Chicago*. Had such test been applied, it would have been readily determined that inquiry as to whether or not Petitioner was terminated for discriminatory reasons or for his employer's proffered, nondiscriminatory reasons of economic necessity and classroom performance without significant risk of unconstitutional inquiry into matters of faith, morals, church governance or other religious matters.

The Third Circuit in *Geary v. Blessed Virgin Mary Parish School*, 7 F.3d 324 (1993) applied the test of *Catholic Bishop of Chicago* in concluding that an elementary school teacher fired ostensibly for having married a divorced man in contravention of Church teaching was entitled to maintain an ADEA claim. There the court limited constitutionally permissible inquiry to whether or not the proffered religious reason was the true reason for the discharge or whether it was pretextual, remarking that this could be one without unconstitutionally inquiring about the school's religious mission or doctrines.

This is a proper balancing of a religion's right to be free from excessive state entanglement and an employee's to be protected from discrimination and breach of contract. The Fourth Circuit, on the other hand, has extended the Constitution's protections without justification, and to the overwhelming detriment of ordinary employees seeking the

---

2. "While religious organizations may designate persons as ministers for their religious purposes, bestowal of such a designation does not control their extra-legal status," *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981).

law's protection[3] — even though those same employees would not likely enjoy the benefits of ministerial status as either tax payers or military draftees.

The Eighth Circuit in *Weissman v. Congregation Share Emeth*, 38 F.3d 1038 (1994) has joined with the Second and Third Circuits in analyzing the Constitutional implications of applying the ADEA to employees of religious institutions.

Finally, it is necessary to address those facts which the Fourth Circuit ignored or derided.

While emphasizing the religious nature of Tithing and the fact that some portion of Petitioner's salary was funded by money raised by Tithing, the Court did not acknowledge the undisputed fact that teacher salaries are funded by tuition income, assessments paid by constituent churches and non-tithe Conference subsidies. (Affidavit of Chesapeake Conference Treasurer.)

The purposes for which monies raised by Tithing is prescribed. Use for "Bible/religion teaching" is ranked eighth among nine permitted uses; and the North American Division Education Policy refers to the Church founder's "counsel restricting the use of tithe for school purposes [which requires that] our system of education must be funded largely from other sources". (Joint Appellate Appendix, Page 250-251.)

The qualifications for teachers are categorized as spiritual, citizenship and professional. The spiritual

---

3. Although the argument was derided by the Court of Appeals, it is significant that the Seventh-Day Adventist Church recognized and affirmed its secular legal obligation not to discriminate in the employment of its teachers. (Appendix A, Page 14.)

qualifications do not distinguish teachers from other Church members; nor do they require teachers to possess training, experience or attributes which distinguish members of the clergy from those to whom they minister. (Joint Appellate Appendix, Page 284.)

None of the duties and responsibilities of teachers are sacerdotal or involve Church governance. (Joint Appellate Appendix, Page 284-285.)

One may be a teacher without holding a ministry of teaching credential, and Petitioner taught for 25 years without such a credential. On the other hand, a teaching certificate issued by the North American Division of the General Conference is required. Education in a Seventh-Day Adventist institution or any other religious institution is *not* required for a teaching credential. Nor, for that matter, is it required for the ministry of teaching credential. Holding a ministry of teaching credential does not confer on holders any authority to preach, lead worship services, perform sacerdotal functions or govern the Church.

Bible study is one of nine courses taught by Petitioner, and students received Bible instruction at their local church.

Each Spring and Fall ordained ministers not teachers would conduct a "Week of Prayer" for students to prepare for sacraments and for counseling.

Petitioner's contract contained a explicit non-discrimination provision.

CONCLUSION

The Court should grant this Petition for Certiorari for any one of the following three reasons:

1. to resolve the important Constitutional question which has been raised;

2. to resolve the conflict between the Fourth Circuit's analysis and that of at least three other circuits; and

3. to determine what effect the expressed will of the Congress should be given in protecting the civil rights of a large and significant number of employees.

Congress intended the protection of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 to apply broadly. The First Amendment's Free Exercise Clause does not require that Congress' intent be diminished by depriving classroom elementary school teachers in religious schools of the protections of federal civil rights statutes. Similarly, the Free Exercise Clause does not require the abrogation of such teachers' contracts with their religious employers.

Too much has been made of that part of Petitioner's role which are particular to teachers in Church run elementary schools and little regard has been given to the largely secular nature of his duties.

The Fourth Circuit alone has erected on an analytic hurdle which far exceeds the requirements of this Court's First Amendment jurisprudence.

For the reasons stated herein and such other and further reasons as may become known to the Court, this Petition should be granted, the Fourth Circuit reversed and Petitioner's First Amended Complaint should be reinstated in the District Court.

Respectfully submitted,

THOMAS J. GAGLIARDO
Counsel of Record
GAGLIARDO & ZIPIN
Attorneys for Petitioner
1010 Wayne Avenue, Suite 500
Silver Spring, MD 20910-5600
(301) 589-1900

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED DECEMBER 29, 1998

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-2648

DONALD E. CLAPPER,

Plaintiff-Appellant,

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS,

Defendant-Appellee,

and

LON GRUESEBECK; COLUMBIA UNION OF SEVENTH-DAY ADVENTISTS,

Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-95-832-WMN)

Appendix A

Argued: October 29, 1998

Decided: December 29, 1998

Before WILKINS, HAMILTON, and LUTTIG, Circuit Judges.

* * *

OPINION

PER CURIAM:

Donald Clapper (Clapper), a former elementary school teacher at Mt. Aetna Academy in Hagerstown, Maryland, brought this civil action against his employer, the Chesapeake Conference of the Seventh-day Adventists (the Chesapeake Conference), alleging discriminatory discharge and discriminatory failure to transfer (1) on account of his age (fifty-nine) in violation of the Age Discrimination in Employment Act (ADEA), *see* 29 U.S.C. § 623(a)(1), (2) on account of his race (Caucasian) in violation of Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-2(a)(1), and (3) in breach of his employment contract. Clapper now appeals the district court's grant of the Chesapeake Conference's alternative motions to dismiss his entire action for lack of subject matter jurisdiction or for summary judgment, and the district court's denial of his post-judgment motion for reconsideration. The district court granted the Chesapeake Conference's alternative motions on the ground that Clapper's action is barred by the First Amendment's Free Exercise of Religion Clause (the Free Exercise Clause), *see*

U.S. Const. amend. I, and denied his motion for reconsideration as being without merit. For reasons that follow, we affirm.

I.

The Chesapeake Conference is the unit of the Seventh-day Adventist Church that operates, based on a traditional 180-day school year, private religious elementary and secondary schools throughout most of Maryland and in some neighboring states. Among these schools is Mt. Aetna Academy, which offers education at the elementary school level. Specifically, Mt. Aetna Academy offers education from kindergarten through eighth grade.

The Chesapeake Conference operates its schools pursuant to a written education code (the Education Code), which is incorporated into all contracts between the Chesapeake Conference and the teachers in its employ. The schools have an express and avowedly sectarian purpose, which is most comprehensively expressed in the Education Code. Indeed, the following passages of the Education Code make clear that the Seventh-day Adventists consider the primary purpose of their elementary and secondary schools to be the salvation of each student's soul through his or her indoctrination in Seventh-day Adventist theological beliefs. Section 1013 of the Education Code provides:

> [t]he Seventh-day Adventist Church in North America operates a program of education, kindergarten through university, that began in 1872. The Church's belief regarding Christian

> education is based on the Scriptures and the writings of Ellen G. White[1] which have provided the Church with a distinct philosophy of education. . . .
>
> *The aim of Seventh-day Adventist education is the redemption of each student.*

(J.A. 260) (emphasis added). The Education Code elaborates on these pronouncements in § 1019:

> Seventh-day Adventists conduct their own schools, elementary through university, for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits and customs. The government maintains a highly developed public school system for making citizens; but in addition to being patriotic, law-abiding citizens, Seventh-day Adventists want their children to be loyal, conscientious Christians. There is peculiar to the Church a body of knowledge, values and ideals that must be transmitted to the younger generation so the Church may continue to exist. In this process the Biblical principle of social transmission is recognized: "Tell ye your children of it, and let your children tell their children, and their children another generation." (Joel 1:3).

---

1. Ellen G. White was the founder of the Seventh-day Adventist Church.

(J.A. 261). Finally, the Education Code establishes at § 1028 that the Seventh-day Adventist School is the Church:

> Criteria That Identifies the Seventh-day Adventist School as the Church:
>
> 1. The mission of the school and the Church are identical — redemption is the task. . . .
>
> a. In studying the great commission, Matthew 28:18-20, the basic task of the Church is an educational task.
>
> b. The Seventh-day Adventist school system has as its basic evangelistic task the redemption and education of the children and youth. *In pursuing this task, it influences them more continuously than any other agency of the Church.*
>
> c. The Church operates a school system to ensure that its youth may receive a balanced physical, mental, moral, social and practical education. The primary aim of each Seventh-day Adventist educational institution is to reflect accurately and to uphold the principles of the Seventh-day Adventist Church. Seventh-day Adventist schools are to be an effective influence in the salvation of our youth and provide the workers for the world-wide task of the Church. The stated interest of the Church is the optimum development of the whole child for both this life and the life hereafter.

(J.A. 265) (emphasis added).

Appendix A

Per the Education Code, the avowed sectarian purpose of Seventh-day Adventist elementary schools is carried out through mandatory devotional periods at the beginning and close of each school day, mandatory witnessing and service activities, formal instruction in the teachings of the Bible according to Seventh-day Adventist theology on a daily basis, and incorporation of Seventh-day Adventist theological beliefs in the traditional academic curriculum. Two examples of incorporation of Seventh-day Adventist theological beliefs into the traditional academic curriculum are the teaching of the Bible's story of creation in science classes and the teaching of the influence of religion on the events of history in social studies classes. One full-time elementary school teacher per grade leads his or her students in these prayer, worshiping, witnessing, and service activities. The same teacher also performs the formal Bible instruction and teaches his or her students the traditional academic curriculum.

In accord with the avowed sectarian purpose of Seventh-day Adventist elementary schools, § 4010 of the Education Code requires that the beliefs and practices of every teacher employed by the Chesapeake Conference be in complete harmony with the beliefs and practices of the Seventh-day Adventist Church. Furthermore, pursuant to various sections of the Education Code, teachers at Seventh-day Adventist schools must be tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances. They are also required to maintain a working knowledge of the Education Code and to read on an annual basis appropriate texts on religion.

Appendix A

In addition to leading students in prayer, formally instructing students in the teachings of the Bible according to Seventh-day Adventist theology, leading the students in witnessing and service activities, and otherwise imparting Seventh-day Adventist theology through the traditional academic curriculum, the Chesapeake Conference offers several examples of the ministerial nature of its full-time elementary school teaching positions. First, pursuant to the working policy of the North American Division of the General Conference of Seventh-day Adventists, a policy incumbent upon the Chesapeake Conference, up to thirty percent of a teacher's salary can be funded by Church tithes.

The primary purpose of Church tithes is to support an evangelistic ministry.[2] Second, the Seventh-day Adventist Church awards a "Commissioned Ministry of Teaching Credential" to its full-time elementary school teachers who, although they may not have undergone formal ministerial

---

2. The policy of using tithes for support of Seventh-day Adventist Schools is predicated on a statement made by Ellen G. White in about 1899, which is quoted in the Working Policy of the North American Division of the General Conference of Seventh-day Adventists: "Our conferences . . . should give the schools a most hearty and intelligent support. Light has been plainly given that those who minister in our schools, teaching the Word of God, explaining the Scriptures, educating the students in the things of God, should be supported by tithe money." (J.A. 251). Furthermore, according to the Working Policy of the North American Division of the General Conference, the reason for the thirty percent limit on the use of tithe funds to pay elementary school teachers' salaries is the belief that thirty percent represents "a reasonable basis on which to evaluate the time devoted by elementary teachers to Bible instruction and spiritual nurture." (J.A. 251).

training, have demonstrated great experience and spiritual commitment to the Church. According to Clapper, this credential "was to somewhat put teachers on a ministerial standing in the church because of the role we played with leading students in their spiritual life. . . ." (J.A. 126-27). And third, the professional ethics section of the Education Code requires Seventh-day Adventist teachers to "[l]ook upon Christian teaching as a holy vocation." (J.A. 285).

Clapper emphasizes that of the thirteen general responsibilities of full-time elementary school teachers specifically listed in the Education Code, only one is explicitly religious — requiring teachers to provide a dynamic environment with emphasis on Christian living and effective learning — none are sacerdotal, and none involve church governance. Representative examples of the other twelve are establishing and maintaining effective classroom organization, assuming responsibility for professional self-improvement, participating in church and community services, and developing effective relationships with parents, patrons and colleagues. The Education Code provides that this list is not exclusive. Clapper also emphasizes that per the Education Code, the Chesapeake Conference has a policy of not discriminating in employment matters on the basis of race, national origin, gender, color, age, marital status, disability or any other basis prohibited by law.

We now turn to the specifics of Clapper's employment with the Chesapeake Conference. The Chesapeake Conference employed Clapper through annual employment contracts as a full-time teacher at Mt. Aetna Academy at various grade levels from 1973 through the school year ending

in May 1993. Throughout his teaching career at Mt. Aetna Academy, Clapper led his students in prayer in the morning, at lunch, at the end of the school day, and at any time throughout the day if a student made a special request for prayer. He also conducted worship each day with his students for approximately ten minutes. Furthermore, on a daily basis he taught Bible as a formal part of the school curriculum and Seventh-day Adventist theology when incorporated into the traditional academic curriculum. Moreover, as required by the Education Code, Clapper engaged his students in the practice of witnessing, which encourages them to apply their faith in a practical way.

In accord with the Education Code, while Clapper taught at Mt. Aetna Academy, he was an active, tithe-paying member of the Seventh-day Adventist Church. On January 20, 1991, the Chesapeake Conference awarded Clapper a Commissioned Ministry of Teaching Credential. Furthermore, thirty percent of Clapper's salary came from Seventh-day Adventist Church tithes.

In March 1993, by letter the Chesapeake Conference notified Clapper, who was fifty-nine years old at the time, that his contract would not be renewed for the 1993-1994 school year. The letter cited two reasons for the nonrenewal — insufficient enrollment and lack of funds needed to support the present number of teachers currently employed at Mt. Aetna Academy. By way of an affidavit of the Superintendent of Schools of the Chesapeake Conference, Lon Gruesebeck, the Chesapeake Conference also cites a history of performance problems and complaints from parents and students as additional factors motivating its decision not to

renew Clapper's contract. The record contains negative teacher evaluations of Clapper by former students, parents, and the principal of Mt. Aetna Academy.

Clapper subsequently filed the present action in which he primarily alleges that the Chesapeake Conference's decisions not to renew his full-time teaching contract for the 1993-1994 school year at Mt. Aetna Academy, or transfer him to another elementary school within its jurisdiction, violated his rights under Title VII, *see* 42 U.S.C. § 2000e — 2(a)(1), and the ADEA, *see* 29 U.S.C. § 623(a)(1), and amounted to a breach of his employment contract. Clapper also alleges that the Chesapeake Conference's failure to offer him the part-time position at Mt. Aetna Academy of music instructor/school librarian for the 1993-1994 school year violated his rights under Title VII and the ADEA, and amounted to a breach of his employment contract.

Prior to discovery, the Chesapeake Conference moved to dismiss Clapper's action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and alternatively moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The district court denied the alternative motions, but granted the Chesapeake Conference leave to renew them at the close of discovery.

At the close of discovery, the Chesapeake Conference moved to dismiss Clapper's action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on the ground that continued enforcement of Clapper's action would violate its rights under the Free

Exercise Clause and the Establishment Clause of the First Amendment. The Chesapeake Conference alternatively moved for summary judgment based on the same grounds. The alternative motions did not challenge any of Clapper's claims on the merits.

Agreeing with the Chesapeake Conference that continued enforcement of Clapper's action would violate its rights under the Free Exercise Clause, the district court granted the Chesapeake Conference's alternative motions without addressing whether the Establishment Clause required dismissal also. Clapper sought reconsideration of the district court's decision by motion, apparently pursuant to Federal Rule of Civil Procedure 59(e), purportedly to correct an error of law and to account for the information contained in an affidavit prepared by himself after the district court dismissed his action. In that affidavit, Clapper attempts to downplay the ministerial nature of his former teaching positions at Mt. Aetna Academy by asserting that the time he spent instructing his students in Bible and leading them in worship constituted only 10.6 percent of his work week. Clapper also speculated that the Commissioned Ministry of Teaching Credential was created to immunize the Seventh-day Adventist Church from lawsuits. Finally, Clapper asserted, based upon his layman's review of certain financial documents, that none of his salary was funded by tithe funds.

The district court denied Clapper's Rule 59(e) motion on the grounds that it had already considered and rejected Clapper's legal arguments and the characterization of his employment in his affidavit was untimely and "wholly inconsistent with the view he previously expressed in this

litigation regarding the religious nature of his position." (J.A. 80). This appeal followed.

II.

In order to properly analyze the merits of the district court's grant of the Chesapeake Conference's alternative motions to dismiss for lack of subject matter jurisdiction or for summary judgment, we must first consider the propriety of the district court's denial of Clapper's Rule 59(e) motion to the extent Clapper premised it upon the information in his attached affidavit. This is because we need to know whether to consider or refrain from considering the information contained in Clapper's affidavit in our review of the propriety of the district court's granting of the alternative motions.

Rule 59(e) provides that an aggrieved party may file a motion to alter or amend a judgment within ten days of its entry. Although Rule 59(e) does not itself provide any standard for when the grant of such a motion is appropriate, this court has recognized three alternative grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). "The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Wright, Miller, and Kane, *Federal Practice and Procedure* § 2810.1, at 127-28 (2d ed. 1995) (footnotes omitted). We review a district court's refusal to grant a Rule 59(e) motion for abuse of discretion. *See Pacific Ins. Co.*, 148 F.3d at 403.

Here, all of the information presented in Clapper's affidavit could have been presented prior to the district court's ruling on the alternative motions. Accordingly, the district court did not abuse its discretion by denying Clapper's motion to the extent he premised it upon the information contained in his attached affidavit. We, therefore, will not consider any of the information in our analysis of the merits of the district court's grant of the Chesapeake Conference's alternative motions to dismiss and for summary judgment.

III.

We now address the propriety of the district court's dismissal of Clapper's action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The existence of subject matter jurisdiction is a legal question, which we review *de novo*. *See Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 754 (4th Cir. 1996).

The district court below concluded that continued maintenance of Clapper's action would violate the Chesapeake Conference's rights to the free exercise of religion as guaranteed by the First Amendment's Free Exercise Clause, and therefore, Clapper's action had to be dismissed. The Free Exercise Clause, which is applicable to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise of" religion. U.S. Const. amend. I. In accord with this prohibition, "decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the

ken of civil courts." *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997); *see also E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 461 (D.C. Cir. 1996). This litigation bar applies in the context of state common law and federal statutory causes of action. *See Bell*, 126 F.3d at 330 (claims for interference with contract; intentional infliction of emotional distress; breach of covenant of good faith and fair dealing; interference with prospective advantage; and wrongful termination); *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (ADEA claim); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (Title VII claims).

Here, we first consider whether the Free Exercise Clause required dismissal of Clapper's Title VII, ADEA, and state common law breach of contract claims challenging the Chesapeake Conference's decisions not to renew his teaching contract at Mt. Aetna Academy for the 1993-1994 school year or transfer him to another elementary school within its jurisdiction. Whether the Free Exercise Clause required dismissal "does not depend upon ordination but upon the function of the position . . ." at issue. *Rayburn*, 772 F.2d at 1168. "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." *Id.* at 1169 (internal quotation marks omitted). The parties refer to this inquiry as the "primary duties test."

Appendix A

The primary duties test "necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." *Id.* Furthermore, while it is our duty to determine whether the position of a full-time elementary school teacher is important to the spiritual mission of the Seventh-day Adventist Church, we may not further inquire whether the reasons for the Chesapeake Conference's decisions not to renew Clapper's contract for the 1993-1994 school year at Mt. Aetna Academy, or transfer him to another elementary school within its jurisdiction, had some explicit grounding in theological belief. *See id.* This is because "[i]n quintessentially religious matters, the free exercise clause of the First Amendment protects the act of a decision rather than the motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal intent." *Id.* (internal quotation marks and citation omitted).

Clapper contends that application of the primary duties test results in the conclusion that the Free Exercise Clause does not bar his claims challenging the Chesapeake Conference's decisions not to renew his contract to teach at Mt. Aetna Academy for the 1993-1994 school year or transfer him to another elementary school within its jurisdiction. Clapper largely relies upon three factual circumstances in support of his contention. First, Clapper relies upon the fact that of the thirteen general responsibilities of full-time elementary school teachers listed in the Education Code, only one is explicitly religious, none are sacerdotal and none involve church governance. Second, he relies upon the Seventh-day Adventist Church's thirty-percent limit on the use of tithe funds to pay teachers' salaries. Because the

primary purpose of tithe funds is to support the evangelistic ministry of the Seventh-day Adventist Church, Clapper posits that at most thirty percent of full-time teachers' duties at elementary schools operated by the Chesapeake Conference can be considered to involve teaching and spreading the faith and/or supervision or participation in religious ritual and worship. Third and finally, Clapper relies upon the Chesapeake Conference's policy against making employment decisions because of race, national origin, gender, color, age, marital status, disability or any other basis prohibited by law as indicia of its acceptance of secular intervention in its employment decisions.

After considering the uncontradicted evidence in this case, we conclude the primary duties of full-time teachers at elementary schools operated by the Chesapeake Conference consist of teaching and spreading the Seventh-day Adventist faith and supervising and participating in religious ritual and worship. As set forth previously, the Education Code of the Chesapeake Conference makes abundantly clear in several provisions that the primary purpose of Seventh-day Adventist elementary education is the redemption of each student's soul through his or her belief and faithful adherence to Seventh-day Adventist theological beliefs, *i.e.*, propagation of the Seventh-day Adventist faith. Nothing in the record suggests the Chesapeake Conference actually operated or continues to operate its elementary schools for a different primary purpose. Furthermore, the Education Code makes clear that in pursuing this primary purpose, the Seventh-day Adventist school system "influences" the youth of the Seventh-day Adventist Church "more continuously than any other agency of the church." (J.A. 265). Not surprisingly, therefore, the

Appendix A

Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose. In light of this reliance, it is understandable that the Chesapeake Conference requires all of its full-time, elementary school teachers to exemplify the teachings of the Seventh-day Adventist faith in their personal and professional lives. The purpose of this requirement is obvious — the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith.[3] When all of these circumstances are considered in combination with the fact that on a daily basis for at least 180-days per year, these teachers formally instruct their students in the teachings of the Bible as understood by the Seventh-day Adventist Church, teach the traditional academic curriculum, which incorporates the teachings of the Seventh-day Adventist Church whenever possible, lead their students in prayer at various times during the day, lead their students in worship at the beginning of the day for about ten minutes, and lead their students in witnessing activities, we are constrained to conclude that the primary duties test is satisfied.

The factual circumstances relied upon by Clapper do not alter our analysis. First, the fact that only one of the thirteen general responsibilities listed in the Education Code is explicitly religious is of no moment, because nothing in the Education Code suggests that the differing general

---

3. Indeed, in the case of Clapper, that the Chesapeake Conference considered him a spiritual leader of his students is partly evidenced by the fact that thirty percent of his salary came from tithe funds.

responsibilities are considered of equal importance and the Education Code expressly states that the list is not exhaustive.

Second, the fact that only thirty-percent of a teacher's salary can be paid with tithe funds is of little relevance. Clapper's reliance upon this factual circumstance incorrectly limits the primary duties test to a purely quantitative test rather than one that obviously has both quantitative and qualitative elements. What is of constitutional significance is whether, in the total mix of circumstances, enforcement of Clapper's action would substantially infringe upon the Chesapeake Conference's right to choose its spiritual leaders. While the relative quantity of time an employee of a religious entity spends directly teaching and spreading the faith, providing church governance, supervising a religious order, or supervising or participating in religious ritual and worship is important in determining whether those activities are the primary duties of such employee, the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology is equally important. And, for the reasons previously set forth, the quantitative and qualitative combination of factual circumstances in the present case compels us to conclude that the primary duties test is satisfied.[4]

---

4. The record contains insufficient information regarding the specific duties of the position of part-time music teacher/librarian at Mt. Aetna Academy for us to conclude the Free Exercise Clause also required dismissal of Clapper's claims related to this position. Nevertheless, we affirm the district court's grant of the Chesapeake Conference's alternative motion for summary judgment with respect to Clapper's claims related to this position, because the undisputed

(Cont'd)

Third, the fact that the Chesapeake Conference follows an internal policy of not basing employment decisions on otherwise legally prohibited reasons does not in any way indicate its acceptance of secular intervention in its employment decisions. Nothing in the Education Code suggests otherwise.

In sum, with respect to Clapper's claims involving a full-time teaching position at Mt. Aetna or another elementary school within the Chesapeake Conference's jurisdiction, we hold the district court did not err in granting the Chesapeake Conference's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The motion was properly granted because continued enforcement of these claims would substantially infringe upon the Chesapeake Conference's rights to freely exercise its religion as guaranteed by the First Amendment's Free Exercise Clause. We caution, however, that the primary duties test is a very fact specific test, and therefore, our holding today is limited to the facts before us.

IV.

In light of our holding, we, like the district court, do not consider whether the First Amendment's Establishment Clause would also require dismissal of Clapper's claims

---

(Cont'd)

evidence establishes that the Chesapeake Conference did not have any role in the decision not to place Clapper in that position for the 1993-1994 school year. Rather, the undisputed evidence establishes that the principal of Mt. Aetna Academy *alone* had discretion to make the decision, made the decision, and funded the position with discretionary funds at his disposal as principal.

involving a full-time teaching position at Mt. Aetna or another elementary school within the Chesapeake Conference's jurisdiction. Furthermore, having concluded that dismissal of these claims under Rule 12(b)(1) for lack of subject matter jurisdiction was proper, we do not consider whether the district court's alternative grant of summary judgment in favor of the Chesapeake Conference with respect to these claims was proper. Finally, in light of our other holdings, we hold the district court did not abuse its discretion in any manner in denying Clapper's Rule 59(e) motion. The judgment of the district court is, accordingly, affirmed.

AFFIRMED

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED OCTOBER 21, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-95-832

DONALD E. CLAPPER

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS

MEMORANDUM

Before the Court is Plaintiff's Motion for Reconsideration of this Court's August 13, 1997 decision dismissing this action on the ground that Plaintiff's employment discrimination claim could not be adjudicated without running afoul of the First Amendment. The instant motion presents either arguments that were considered and rejected in the Court's earlier decision, or rebuttal evidence that should have been offered in response to the original motion. Furthermore, the Court finds that Plaintiff's current characterization of his employment is wholly inconsistent with the view he previously expressed in this litigation regarding the religious nature of his position.[1]

---

1. That this litigation has apparently forced Mr. Clapper to so drastically re-characterize his many years of service to his church in this manner may prove to be the most unfortunate aspect of this litigation.

Appendix B

For the reason set forth in this Court's August 13, 1997 Memorandum, the motion for reconsideration will be denied. A separate order will issue.

s/ William M. Nickerson
William M. Nickerson
United States District Judge

Dated: October 21, 1997

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-95-832

DONALD E. CLAPPER

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 21st day of October, 1997, by the United States District Court for the District of Maryland, ORDERED:

1. Plaintiff's Motion for Reconsideration is DENIED; and

2. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

s/ William M. Nickerson
William M. Nickerson
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED AUGUST 13, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-95-832

DONALD E. CLAPPER

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS

MEMORANDUM

Before the Court is Defendant's Motion to Dismiss Pursuant to Rule 12(b)(1) or, in the Alternative, for Summary Judgment. Paper No. 36. Plaintiff has opposed the motion, and Defendant has replied. Upon a review of the motion and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that the motion will be granted.

I. BACKGROUND

Defendant Chesapeake Conference of Seventh-day Adventists ("Chesapeake") is the unit of the Seventh-day Adventist Church that operates private religious schools throughout most of Maryland, as well as in some neighboring states. This action arises out of Chesapeake's decision in the spring of 1993 not to renew Plaintiff Donald E. Clapper's contract to teach at Mount Aetna Seventh-day Adventist

School in Hagerstown, Maryland. Chesapeake claims that the decision was prompted by a reduction in student enrollment at Mt. Aetna, as well as a history of performance problems on the part of Plaintiff. Plaintiff alleges that the decision was motivated by his gender and age (he was one month short of 60 years of age when his contract was non-renewed). In this action, Plaintiff brings claims pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ["ADEA"], and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e, *et seq.*, as well as various state common law claims.

The Court previously denied a motion by Defendant that attacked the merits of Plaintiff's discrimination claims. In the instant motion, Defendant makes two arguments that are more jurisdictional in nature. First, Defendant contends that application of the ADEA in this context would be inappropriate, given the significant risk of First Amendment infringement and the lack of expressed Congressional intent that the ADEA apply to religious schools. Second, Defendant argues more generally that all of Plaintiff's claims, both statutory and common law, are barred by the First Amendment. In urging the Court to so find, Defendant argues that Plaintiff's position at Mt. Aetna falls within the "ministerial exception" set forth in the Fourth Circuit Court of Appeals decision in *Rayburn v. General Conf. of Seventh-day Adventists*, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986). Because the Court finds that the instant action does fall within the scope of *Rayburn*, it need not address Defendant's additional arguments.[1]

---

1. Defendant also argued that Plaintiff's claims were barred under the Religious Freedom Restoration Act of 1993, 42 U.S.C.

(Cont'd)

(Cont'd)
§ 2000bb *et seq.* ("RFRA"). After briefing on this motion was complete, however, the Supreme Court declared RFRA unconstitutional. *City of Boerne v. Flores, Archbishop of San Antonio*, No. 95-2074, 65 U.S.L.W. 4612 (June 25, 1997).

The Supreme Court's rejection of RFRA in *City of Boerne*, coupled with its decision in *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the decision which gave rise to RFRA, raises at least a potential question as to whether the ministerial exception survives. In *Smith*, a case involving the use of peyote in connection with Native American religious ceremonies, the Court held that "the right of free exercise does not relieve *an individual* of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes." 494 U.S. at 879 (emphasis added). In reaction to *Smith*, Congress passed RFRA, seeking to restore pre-*Smith* Free Exercise jurisprudence which Congress believed required a "compelling governmental interest" before the government could substantially burden a person's exercise of religion.

The demise of RFRA gives rise to the question of whether *Smith* had any impact on the viability of the ministerial exception. The Court of Appeals for the District of Columbia Circuit addressed that very issue in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996). The court concluded from its review of the Supreme Court's First Amendment jurisprudence that while *Smith* withholds First Amendment protection from an individual whose religious practices might violate a neutral law of general application, it did not disturb the "long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " 83 F.3d at 462 (quoting *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

Appendix C

II. DISCUSSION

Courts have long recognized that the Free Exercise Clause of the First Amendment "precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them." *See EEOC v. Catholic University of America*, 83 F.3d 455, 461 (D.C. Cir. 1996) (collecting cases). This "ministerial exception" has not been limited exclusively to members of the ordained clergy, however. Courts have found the exception equally applicable to a variety of other employees of religious institutions: a chaplain in a church-affiliated hospital,[2] a professor of canon law at a Catholic university,[3] a non-ordained professor at a Baptist seminary,[4] a theology teacher at a Catholic high school,[5] and a principal of a parochial high school.[6]

Rayburn v. General Conf. of Seventh-day Adventists is the leading decision in the Fourth Circuit applying the ministerial exception. In *Rayburn*, the plaintiff filed a Title

---

2. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991).

3. *EEOC v. Catholic University of America*, *supra.*

4. *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

5. *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994).

6. *Sabatino v. Saint Aloysious Parish*, 672 A.2d 217 (N.J. Super. 1996).

VII suit after another candidate was hired for a position as an "associate of pastoral care" for which she had also applied. That position was a non-ordainable position, entailing "teaching baptismal and Bible classes, pastoring the singles group, occasional preaching . . . and other evangelical, liturgical, and counseling responsibilities." 772 F.2d at 1165. After reviewing the responsibilities encompassed in the position, the court concluded that the role of an associate of pastoral care is "so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious freedom." *Id.* at 1168.

In reaching this conclusion, the Fourth Circuit noted that the fact that this was a non-ordainable position was immaterial. "The 'ministerial exception'," the court held, "does not depend upon ordination but upon the function of the position. . . . As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, *or* supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " *Id.* at 1168-69. (emphasis added, citation and internal quotation omitted.)[7]

---

7. At the end of the *Rayburn* decision, the court listed with qualified approval several decisions from other jurisdictions involving religious institutions where the employment decision at issue was found not to involved the church's spiritual mission. 772 F.2d at 1171. These decisions involved: a psychology professor at a Baptist university (*EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912, (1981)); the administrative and support staff at a seminary (*EEOC v. Southwestern Baptist*

(Cont'd)

In finding the exception applicable, the court also stated that the reason given by the church for its failure to hire the plaintiff was also immaterial:

> While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief. Emphasis on the role of an associate in pastoral care rather than the reasons for Rayburn's rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions. . . . [T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it.

772 F.2d 1169.

The case law teaches, and the parties acknowledge, that the determination as to whether the ministerial exception is applicable must be made on a case-by-case basis. *See Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1044 (8th Cir. 1994) ("The case-by-case approach . . . is the appropriate method for determining those matters which

---

(Cont'd)

Theological Seminary, 651 F.2d 277); an editorial secretary at church-affiliated publishing house (*EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982)); and a typist-receptionist (*Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975)).

threaten constitutional infringement."). Thus, in resolving this motion, the Court must look with some detail into the nature of Plaintiff's position at Mt. Aetna as well as into the Seventh-day Adventist Church's view of the role of its schools within the broader mission of the church.

Seventh-day Adventist schools are operated under an Education Code which is incorporated by reference into the employment contract of every teacher. The Code was incorporated into Plaintiff's contract. The Education Code states that the church's educational philosophy is based on Scripture, as well as on the writings of Ellen G. White, one of the founders of the church. Education Code, Def.'s Ex. 1 at § 1013. According to the Code, "Seventh-day Adventists conduct their own schools, elementary through university, for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits and customs." *Id.* at § 1019.

Under the Seventh-day Adventist educational philosophy, the Seventh-day Adventist school is equated, in many respects, with the church.

> The mission of the school and the Church are identical — redemption is the task. . . . The Seventh-day Adventist school system has as its basic evangelistic task the redemption and education of the children and youth. In pursuing this task, it influences them more continuously than any other agency of the Church. . . . The primary aim of each Seventh-day Adventist educational institution is to reflect accurately and

> to uphold the principles of the Seventh-day Adventist Church.

Id. at § 1028. To assure that the mission of the school reflects the basic religious purpose as set forth in the Education Code and the church's teachings, the school board of Mt. Aetna is composed of ministers from each of the neighboring Seventh-day Adventist churches. Aff. of Lon Gruesbeck at ¶ 4.

In recognition of the ministerial role of teachers in Seventh-day Adventist schools, the Working Policy of the North American Division of the General Conference of the Seventh-day Adventist Church ("Working Policy") provides that, in certain situations, up to thirty percent of a teacher's salary can be paid from tithe funds. Under Seventh-day Adventist beliefs, tithe fund are "sacred funds," "to be used for one purpose — to sustain the ministers whom the Lord has appointed to do His work." Def's Ex. 4 at 408. Recognizing that "Bible teachers exercise a more specifically spiritual and ministerial role by instructing their students in the Word of God and by leading them to the Savior," the church has determined that "[s]uch service is worthy of tithe support." *Id.* at 410. Because Plaintiff's responsibilities included teaching Bible classes, 30% of Plaintiff's salary came from tithe funds. Gruesbeck Aff. at ¶ 6.

Also in recognition of that "ministerial role,", [t]he church's Working Policy also allows for the granting of a "Commissioned Ministry of Teaching Credential" to those teachers who demonstrate a greater experience and greater spiritual commitment to the church. Def.'s Ex. 4 at 90 and

Gruesbeck Aff. at ¶ 5. Plaintiff was awarded the Commissioned Ministry of Teaching Credential on January 20, 1991.

Plaintiff's ministerial role at Mt. Aetna is also reflected in Plaintiff's own deposition testimony. Plaintiff stated that he led the children in prayer each morning, at lunch, at the close of the day, as well as on occasion when "students would come with a special request for a prayer." Plaintiff's Dep. at 189. He also stated that he conducted worship each day with his students. *Id.* Plaintiff considered the counseling he provided to his students facing personal problems to be a part of his responsibilities in "meet[ing] the spiritual needs of the children." *Id.* at 193. When asked the significance of the "Commissioned Ministry of Teaching Credential" he received, Plaintiff stated, "[t]his was to somewhat put teachers on a ministerial standing in the church because of the role we played with leading students in their spiritual life and our responsibility as teachers." *Id.* at 188.

In response to the evidence and argument presented by Defendant supporting the conclusion the Plaintiff served in a "ministerial role," Plaintiff offers only conclusory statements with little supporting evidence.[8] While affirming

---

8. While offering little factual support for his jurisdictional argument, Plaintiff devotes several pages of his opposition to a discussion of the merits of his age and gender discrimination claims. Opposition at 6-9. While not relevant to the issue presently before the Court, Plaintiff's discussion warrants a brief comment. In deciding a previous motion on the merits of Plaintiff's claims, the Court noted that the decision as to whether to permit Plaintiff to continue to pursue

(Cont'd)

that the determination of ministerial status must be made on a case-by-case basis, Plaintiff proceeds to characterize decisions from other circuits as standing for a sweeping generalization that the ministerial exception can never be applied to lay teachers in religious schools. Plaintiff argues:

> Mr. Clapper is a teacher with some religious duties. He is not a Minister, although his teaching certificate bears the title "commissioned ministry of teaching credential;" he is not a Chaplain, although he leads his students in prayer; he is not a religious counselor, although he counsels his students and he is not a Professor of theology, although the curriculum he teaches includes a Bible class. Donald Clapper is a lay teacher in a religious school whose religious duties are not significantly greater or less than the teachers in *DeMarco [v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993)] and *Geary [v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993)] or the other cases discussed above.

Opposition at 21. Thus, Plaintiff apparently argues that as long as the title "lay teacher" attaches to his position, he will fall outside the scope of the ministerial exception regardless

---

(Cont'd)

this litigation was "undeniably a close call." April 1, 1996 Memorandum at 10. Concerned that Plaintiff had yet to have the opportunity to take discovery, the Court denied the motion, with leave to Defendant to renew the motion at the close of discovery. Even with the benefit of discovery, however, it appears that Plaintiff has found little to support his claims.

of the combination of duties entailed in that position. That is not the kind of analysis mandated by the Fourth Circuit in *Rayburn*.

In determining the applicability of the ministerial exception, *Rayburn* requires that the Court "determine whether a position is important to the spiritual and pastoral mission of the church." 772 F.2d at 1169. Plaintiff led his students in prayer and worship, counseled his students, and taught Bible classes. According to church doctrine, the primary mission of the school in which he taught was the redemption of his students, a mission to which Plaintiff testified he was faithful. *See* Plaintiff's Dep. at 191-92. It is undeniable that the church considered Plaintiff's particular role at Mt. Aetna to be ministerial in that it sanctioned the use of tithe funds to pay one third of his salary. All the evidence before the Court points to the conclusion that Plaintiff's position was one that was important to the spiritual and pastoral mission of the Seventh-day Adventist church.

Geary, *DeMarco*, and the other decisions cited by Plaintiff can be distinguished on their facts. In *Geary*, the only discussion of the religious element in plaintiff's teaching position was her "apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles." 7 F.3d at 331. The plaintiff in *DeMarco* was a high school teacher who only taught the subject of math and whose religious duties were limited to leading his students in prayer and taking them to Mass. 4 F.3d at 168. Interestingly, the court in *DeMarco* specifically noted that it was leaving open the possibility that "[t]here may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is

impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause." 4 F.3d at 172.

Plaintiff also relies on *Ritter v. Mt. Saint Mary's College*, 738 F.2d 431, No. 81-1534 (June 8, 1984), an unpublished decision of the Fourth Circuit. In *Ritter*, the plaintiff was an assistant professor of education at a "religiously affiliated" college. Judge Northrop of this Court dismissed the plaintiff's ADEA and Equal Pay Act claims, finding that the application of those statutes to a religiously affiliated college would infringe upon the institution's First Amendment rights. *See Ritter v. Mt. Saint Mary's College*, 495 F. Supp. 724 (D. Md. 1980). While the Fourth Circuit reversed that decision, it did so only after observing that "Mount Saint Mary's, unlike the parochial schools in *[NLRB v.] Catholic Bishop*, [440 U.S. 490 (1979)] is not a pervasively sectarian institution. . . . As such, its lay teachers are not concerned with indoctrinating the student body with the tenets of a religious faith."[9] Slip Op. at 6 (citations omitted). The Court also noted that in church related colleges and universities, in contrast to primary and secondary schools, "religious indoctrination is not a substantial purpose or activity." *Id.* at 6 n.4.[10]

---

9. While church affiliated, the college was not "church operated." Slip Op. at 6.

10. Plaintiff also relies on *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994). The plaintiff in *Weissman* was a temple administrator who "played no role in decisions related to spiritual matters." 38 F.3d at 1040. The only portion of his job description that could be said to have had a religious component was the requirement that he "have a positive attitude toward Jewish life and a Jewish background enabling [him] to understand the work of the Temple, its purpose and highest ideals and goals." *Id.*

Appendix C

None of the teachers in cases cited by Plaintiff had the full range of religious responsibilities that the record in this case reveals. Most notably, there is no indication in those other decisions that the plaintiffs were paid with funds whose use was expressly limited to ministerial functions.

In addition to arguing that Plaintiff's job title takes him outside the scope of the ministerial exception, Plaintiff also argues that, because Defendant did not proffer any religious justification for Plaintiff's dismissal, investigation of his discrimination claims poses "no significant risk of First Amendment infringement." Opposition at 23-24. The Fourth Circuit reaches a different conclusion in *Rayburn*, noting,

> A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. § 2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions. In *Catholic Bishop*, the Supreme Court, holding that church-operated schools were not subject to NLRB jurisdiction, noted that "It is not only the conclusions that may be reached by the Board

> which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502, 99 S. Ct. at 1319. The same is true here. There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

772 F.2d at 1171.

Defendant indicates that the danger of which the Fourth Circuit warned is precisely what has occurred as a result of this suit. Lon Gruesbeck, the Education Superintendent of Chesapeake Conference stated that the institution of this suit

> has influenced the decision-making of the church in employment matters, and has hampered the church's ability to select those individuals who it believes will best serve the religious purpose of the schools. The impact of this litigation has been to make Chesapeake Conference view employment decisions with an eye toward possible litigation. This skews the decision-making process and compromises the church's ability to select those it considers best suited to its religious mission. The inevitable result of judicial scrutiny forces administrators to adopt risk-averse approaches to employment decisions. This often

> means retaining an individual who is not best suited to carry forward the church's message, and to train the future workers of the church.

Gruesbeck Aff. at ¶ 11.

In opposing the motion, Plaintiff also relies on portions of the Education Code that express Defendant's commitment not to discriminate in its employment decisions. Opposition at 4-6 (citing Education Code at §§ 1019 and 4010).[11] The existence of an anti-discrimination policy, however, does not confer jurisdiction over an alleged breach of that commitment upon this Court. As Defendant observes, the same Education Code that contains the provisions prohibiting discrimination and to which Plaintiff subscribed when he entered into his employment, also provides for an extensive conciliation and appeal procedure to be employed in order to avoid civil litigation and to promote the religious values of the church. *See* Education Code § 4810.[12] To the extent these provisions

---

11. These provisions state that Defendant "offers equal opportunity for appointment and promotion and does not discriminate in its employment polices and practices on the basis of race, national origin, gender, color, age, marital status, disability or any other basis prohibited by law."

12. Section 4810 provides in pertinent part:

> A church member should not instigate litigation against any entity of the church except under circumstances where the church has not provided adequate process for orderly settlement of the greivance within the church, or where the nature of the case is such that it is clearly not within the authority of the church to settle.

(Cont'd)

are relevant to this motion, they support the position that this Court should refrain from exercising jurisdiction over Plaintiff's claims.

For all of the above-stated reasons, the Court finds that Plaintiff's position at Mt. Aetna was ministerial in nature and that this Court cannot adjudicate his employment discrimination claims without running afoul of the First Amendment. The Court notes that this holding is a narrow one. It is not a sweeping ruling that all teachers in parochial schools fall under the ministerial exception, certainly many will not. Neither is the Court holding that all teachers in Seventh-day Adventist schools would necessarily fall within the scope of the exception. Other cases will require the same case-by-case analysis that this Court has endeavored to engage in here.

A separate order will issue.

s/ William M. Nickerson
William M. Nickerson
United States District Judge

Dated: August 13, 1997

(Cont'd)

After reviewing the same contract and employment procedures at issue in the present case, at least one court has concluded that the bringing of an employment discrimination suit was not only violative of the constitutional guarantees of free exercise of religion, but was also in violation of the express contractual intent of the parties. *Green v. Allegheny East Conference of Seventh-day Adventists*, (Sup. Ct., Essex Co., New Jersey, July 9, 1996).

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-95-832

DONALD E. CLAPPER

v.

CHESAPEAKE CONFERENCE OF SEVENTH DAY ADVENTISTS, *et al.*

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 13th day of August, 1997, by the United States District Court for the District of Maryland, ORDERED:

1. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(1) or, in the Alternative, for Summary Judgment, Paper No. 36, is hereby GRANTED and Plaintiff's claims are DISMISSED;

2. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. p. 58; and

3. That this case is hereby CLOSED;

4. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

s/ William M. Nickerson
William M. Nickerson
United States District Judge

Supreme Court, U.S.
FILED
APR 29 1999
CLERK

No. 98-1566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONALD E. CLAPPER,

Petitioner,

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PAUL D. RASCHKE
Counsel of Record
H. DEAN BOULAND
CATHERINE C. HESTER
LORI B. KISCH
BOULAND & BRUSH, LLC
Attorneys for Respondent
201 North Charles Street
Suite 2400
Baltimore, Maryland 21201
(410) 752-6000

152708

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2688

QUESTION PRESENTED

Does the Free Exercise Clause of the First Amendment, which guarantees a church's right to select its religious leaders free from governmental interference, shield it from the employment discrimination claims of its elementary school teacher whose function is inherently religious?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of Jurisdiction	1
Statement of the Case	1
A. Clapper Mischaracterizes Seventh-Day Adventist Education as Secular	3
B. Clapper's Own Role at Mt. Aetna School Was Inherently Religious	6
Reasons for Denying the Writ	8
I. The Ministerial Exception Is Settled Law And Its Case-Specific Application Does Not Warrant Certiorari.	9
A. The Ministerial Exception, Which Bars the Adjudication of Employment Discrimination Claims by Religious Employees, Is a Settled Principle of Judicial Abstention That Properly Averts Constitutional Confrontations	9
B. *Rayburn's* Application in this Case Does Not Warrant Grant of a Writ	17
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982) 1

Aguilar v. Felton, 473 U.S. 402 (1985), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203 (1997) 18

Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988) 15

Cantwell v. Connecticut, 310 U.S. 296 (1940) 9

Christians v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43, 142 L. Ed. 2d 34 (1998) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 12

DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993) 15, 16

Drevlow v. Lutheran Church, 991 F.2d 468 (8th Cir. 1993) 10

Eaton v. Dorchester Development, Inc., 692 F.2d 727 (11th Cir. 1982) 1

E.E.O.C. v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996) 10, 11, 12, 14

Cited Authorities

Page

E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) 10, 11, 14

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 11, 12

Everson v. Board of Education, 330 U.S. 1 (1947) 9

Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324 (3d Cir. 1993) 15, 16

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) 10

Himaka v. Buddhist Churches of America, 917 F. Supp. 698 (N.D. Calif. 1995) 14

Jocz v. Labor and Industry Review Commission, 538 N.W.2d 588 (Wisc. Ct. App. 1995) 15

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1952) 10

Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America, 363 U.S. 190 (1960) 9

Cited Authorities

Page

Lemon v. Kurtzman, 403 U.S. 602 (1971) 17

Lewis v. Seventh-day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992) 10

McClure v. The Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) 10, 12

Meek v. Pittenger, 421 U.S. 349 (1975) 18

Miller v. Catholic Diocese of Great Falls, Billings, 728 P.2d 794 (Mont. 1986) 14, 15

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) 10

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 15, 16, 18

Osbourn v. U.S., 918 F.2d 724 (8th Cir. 1990) 1

Pierce v. Iowa-Missouri Conference of Seventh-day Adventists, 534 N.W.2d 425 (Iowa 1995), *cert. denied*, 517 U.S. 1220 (1996) 11

Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) 11, 14

Cited Authorities

Page

Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) 1, 8, 11, 12, 13, 14, 17

Sabatino v. Saint Aloysius Parish, 672 A.2d 217 (N.J. Super. App. Div. 1996) 15

Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) 10, 17

Schmoll v. Chapman University, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999) 11

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 10, 13

Weismann v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994) 17

Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992) 14

Williamson v. Tucker, 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) 1, 2

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10

Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994) 10

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623(a)(1) 1, 2

29 U.S.C. § 623(a)(2) 1

42 U.S.C. §§ 2000bb to 20000bb-4 12

42 U.S.C. § 2000e-2(a)(1) 1, 2

42 U.S.C. § 2000e-2(a)(2) 1

United States Constitution:

First Amendment ..... i, 8, 9, 16

Rules:

Fed. R. Civ. P. 12(b)(1) 1, 7

4TH CIR. R. 36(b) 17

4TH CIR. R. 36(c) 17

Cited Authorities

Page

Other Authorities:

Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979) 13

Section 1013 of the Seventh-day Adventist Education Code 5

Section 1019 of the Seventh-day Adventist Education Code 5

Section 1028 of the Seventh-day Adventist Education Code 3, 14

Seventh-day Adventists, ENCYCLOPEDIA AMERICANA 620 (1991) 5

Ellen G. White, EDUCATION 30 (1903) 14

Ellen G. White, ENCYCLOPEDIA OF RELIGION 377 (1987) 5

STATEMENT OF JURISDICTION

Chesapeake Conference of Seventh-day Adventists ("Chesapeake Conference"), does not dispute Petitioner's contention that this Court may assert jurisdiction pursuant to 28 U.S.C. § 1254(1). It denies, however, that the constitutionality of any federal statutes is at issue in this case. The United States Court of Appeals for the Fourth Circuit made no finding as to the constitutionality of either 29 U.S.C. §§ 623(a)(1) and (2) or 42 U.S.C. §§ 2000e-2(a)(1) and (2). Rather, the Court of Appeals, relying on *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), merely affirmed the District Court's abstention from the exercise of jurisdiction.

STATEMENT OF THE CASE

This petition arises from the unreported *per curiam* decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's dismissal of Donald Clapper's employment discrimination claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The District Court made detailed factual findings in its jurisdictional ruling and those factual findings were not properly challenged before, or disturbed by, the Court of Appeals on review.[1] Clapper's description of the case is

---

1. Although there is ample authority for the proposition that the trial court's Rule 12(b)(1) factual findings should be reviewed for clear error, *see, e.g.*, *Osbourn v. U.S.*, 918 F.2d 724, 728-31 (8th Cir. 1990); *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), *Williamson v. Tucker*, 645 F.2d 404, 412-14 (Cont'd)

inconsistent with these unchallenged and undisturbed factual findings, and the statement that follows is, accordingly, drawn directly from the opinions of the Court of Appeals and the District Court.

As noted by the Court of Appeals, the evidence in this case is uncontradicted. Pet. App. 16a. Donald Clapper ("Clapper"), a former teacher for the Seventh-day Adventist Church, sued the Chesapeake Conference,[2] alleging that the decision to not renew his employment contract was based on gender and age discrimination in violation of federal statutes and his employment contract. In particular, Clapper argued that the non-renewal of his employment contract violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1),[3] and his common law contractual rights.[4] Pet. App. 2a.

(Cont'd)
(5th Cir.), *cert. denied*, 454 U.S. 897 (1981), the Court of Appeals appears instead to have applied the *de novo* standard to both factual and legal questions. Pet. App. 13a. Its factual findings do not differ in any material respect, however, from those of the District Court.

2. The Chesapeake Conference of Seventh-day Adventists is a unit of the Seventh-day Adventist Church that operates churches and schools in Maryland and neighboring states. Pet. App. 3a.

3. A typographical error in the Court of Appeals' opinion erroneously suggests that Clapper's Title VII cause of action is based on a claim of racial, rather than gender, discrimination. Pet. App. 2a. The true basis for his claim is accurately reflected in the District Court's opinion. Pet. App. 25a.

4. Chesapeake Conference's stated reasons for not renewing Clapper's contract were declining enrollment and lack of funds. (Cont'd)

Prior to the expiration of his employment contract, Clapper was an elementary school teacher for Mt. Aetna School, a Seventh-day Adventist school in Hagerstown, Maryland. Mt. Aetna School, like other Seventh-day Adventist private religious elementary and secondary schools throughout Maryland, has an "avowedly sectarian purpose." Pet. App. 3a. To further its goals, "the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose." Pet. App. 17a. The school's operations are governed by an Education Code prescribed by the Church which is incorporated into all contracts between Chesapeake Conference and its teachers. Pet. App. 3a.

A. Clapper Mischaracterizes Seventh-day Adventist Education as Secular

Clapper implausibly recasts Seventh-day Adventist education as predominately secular. His characterization is faithless to the record and contrary to the explicit factual findings made by both courts below. The Court of Appeals, relying on the Seventh-day Adventists' Education Code, found that the Church and its schools are indistinguishable. Pet. App. 5a. Section 1028 of the Education Code provides:

> Criteria That Identifies the Seventh-day Adventist School as the Church:

(Cont'd)

The record further reflects the Church's position that Clapper was not selected for renewal based on a history of performance problems and complaints from parents and students. Pet. App. 9a. Although his claims were not adjudicated on the merits, the District Court noted that even with the benefit of full discovery, Clapper had "found little to support [them]." Pet. App. 33a.

> 1. The mission of the school and the Church are identical — redemption is the task . . .
>
> a. In studying the great commission, Matthew 28:18-20, the basic task of the Church is an educational task.
>
> b. The Seventh-day Adventist school system has as its basic evangelistic task the redemption and education of the children and youth. *In pursuing this task, it influences them more continuously than any other agency of the Church.*
>
> c. The Church operates a school system to ensure that its youth may receive a balanced physical, mental, moral, social and practical education. The primary aim of each Seventh-day Adventist educational institution is to reflect accurately and to uphold the principles of the Seventh-day Adventist Church. Seventh-day Adventist schools are to be an effective influence in the salvation of our youth and provide the workers for the world-wide task of the Church. The stated interest of the Church is the optimum development of the whole child for both this life and the life hereafter.

Pet. App. 5a (emphasis added).

As noted by the Court of Appeals, the primary purpose of elementary and secondary Seventh-day Adventist schools is "the salvation of each student's soul through his or her indoctrination in Seventh-day Adventist theological

beliefs." Pet. App. 3a. Section 1013 of the Education Code provides:

> [T]he Seventh-day Adventist Church in North America operates a program of education, kindergarten through University, that began in 1872. The Church's belief regarding Christian education is based on the Scriptures and the writings of Ellen G. White[5] which have provided the Church with a distinct philosophy of education . . .
>
> *The aim of Seventh-day Adventist education is the redemption of each student.*

Pet. App. 3a-4a (emphasis added).

Section 1019 of the Education Code further provides:

> Seventh-day Adventists conduct their own schools, elementary through university, for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits, and customs. The government maintains a highly developed public school system for making citizens; but in addition to being patriotic, law-abiding citizens, Seventh-day Adventists want their children to be loyal, conscientious Christians. There is peculiar to the Church a body

---

5. Ellen G. White was one of the founding members of the Seventh-day Adventist Church. *See Seventh-day Adventists*, ENCYCLOPEDIA AMERICANA 620 (1991); *Ellen G. White*, ENCYCLOPEDIA OF RELIGION 377 (1987).

> of knowledge, values, and ideals that must be transmitted to the younger generation so the Church may continue to exist. In this process the Biblical principle of social transmission is recognized: "Tell ye your children of it, and let your children tell their children, and their children another generation." (Joel 1:3).

Pet. App. 4a.

B. Clapper's Own Role at Mt. Aetna School Was Inherently Religious

Clapper's daily regimen was faithful to the mission established in the Seventh-day Adventist Education Code. The record demonstrates that he led his students in prayer in the morning, at lunch, at the end of the school day, and at any time that a student made a special request for prayer. Pet. App. 9a, 32a. Clapper also counseled his students, which he characterized as part of his responsibilities in, "meet[ing] the spiritual needs of the children." Pet. App. 32a. He conducted worship each day for approximately ten minutes. Pet. App. 9a. Also, on a daily basis he taught Bible study as a formal part of the school curriculum. *Id.* Consistent with the requirements of the Education Code, Seventh-day Adventist theology was incorporated into his teaching of the traditional academic curriculum. *Id.* Also, as required by the Code, Clapper involved his students in the Seventh-day Adventist practice of witnessing, which encourages the students to apply their faith in a practical way. *Id.*

During his employment with Mt. Aetna, and consistent with the Education Code's requirements, Clapper was an

active, tithe-paying member of the Seventh-day Adventist Church. Pet. App. 9a. As prescribed by Church policy, thirty percent of Clapper's salary was paid directly from tithe funds reserved for ministerial purposes.[6] *Id.* In addition, on January 20, 1991, Clapper was awarded a "Commissioned Ministry of Teaching Credential" which demonstrated his substantial experience and profound spiritual commitment to the Church. *Id.* Clapper testified that the credential, "was to somewhat put teachers on a ministerial standing in the church because of the role we played with leading students in their spiritual life . . ." Pet. App. 7a-8a. In sum, Clapper's role as an elementary school teacher for the Seventh-day Adventists was sectarian in purpose and fact.

At the close of discovery, Chesapeake Conference moved for dismissal of Clapper's suit on the grounds that adjudication of his claims would improperly burden the Church's free exercise of religion. On August 13, 1997, in an unreported decision, the United States District Court for the District of Maryland granted Chesapeake Conference's Rule 12(b)(1) motion. Docket No. CA-95-832-WMN.

---

6. The Court of Appeals noted that, "the primary purpose of Church tithes is to support an evangelistic ministry." Pet. App. 7a. The use of tithe funds to support the teaching ministry stems from the early teachings of founder Ellen White:

> Our conferences . . . should give the schools a most hearty and intelligent support. Light has been plainly given that those who minister in our schools, teaching the Word of God, explaining the Scriptures, educating the students in the things of God, should be supported by tithe money.

Pet. App. 7a n.2.

Pet. App. 24a. The court found that Clapper's claims were barred by the "ministerial exception" articulated in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Clapper thereafter noted a timely appeal to the United States Court of Appeals for the Fourth Circuit and on December 29, 1998 that court affirmed the District Court's decision in an unpublished *per curiam* decision bearing Docket No. 97-2648. Pet. App. 1a. Its mandate thereafter issued on January 20, 1999.

Clapper then petitioned for a writ of certiorari, seeking review in this Court of the Fourth Circuit's ruling.

REASONS FOR DENYING THE WRIT

The conflict among the circuits described in Clapper's petition is chimerical. The Court of Appeals adhered to settled law in affirming the District Court's ruling that the ministerial exception, which bars the adjudication of employment discrimination claims by religious employees, stripped it of jurisdiction to hear Clapper's claims. The ministerial exception is, in fact, widely followed in both federal and state courts without dissension. It has been invoked to bar not only the employment claims of ministers, but the claims of principals, teachers, church organists and hospital chaplains as well. What Clapper complains of is not a true division among the circuits, but merely the personally disagreeable consequences of the ministerial exception's application to the facts of his case. That the Court of Appeals' decision neither amplifies nor alters existing precedent is unimpeachably attested to by its unpublished status. Nonetheless, Clapper contends that this unsigned and unpublished decision will undermine the First

Amendment's even application. A reasoned examination of the authorities dispels this contention.

I.

THE MINISTERIAL EXCEPTION IS SETTLED LAW AND ITS CASE-SPECIFIC APPLICATION DOES NOT WARRANT CERTIORARI.

A. The Ministerial Exception, Which Bars the Adjudication of Employment Discrimination Claims by Religious Employees, Is a Settled Principle of Judicial Abstention That Properly Averts Constitutional Confrontations

The adjudication of civil rights claims will, on rare occasions, give rise to clashes with the First Amendment. Courts have adopted a policy of judicial abstention to avoid this potential calamity where the claimant is employed in a religious calling. This established principle of constitutional law enjoys wide support in both federal and state courts and it has been applied to a variety of religious employees. The history of this doctrine proves that it is no upstart, but a firmly rooted feature of the judicial landscape.

The Free Exercise clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I. This Court has applied the limits of the First Amendment to the judicial as well as the legislative branches, *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190, 191 (1960), and to state as well as federal governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). Its precedents

also establish that governmental action may impermissibly burden free exercise by interfering with individual belief or practice, *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972), or by interfering with a church's ability to govern its internal affairs. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). In the latter category, this Court has demonstrated pronounced reluctance to interfere with a church's selection of its religious leaders. *Gonzalez*, 280 U.S. at 16; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-10 (1976).

In the wake of the enactment of Title VII and the ADEA, federal and state courts have continued this policy of judicial abstention by creating the "ministerial exception." The ministerial exception to Title VII was first adopted in *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). While various rationales have been offered for the ministerial exception, it finds its unifying antecedents among this Court's church governance cases. *E.E.O.C. v. Catholic University*, 83 F.3d 455, 462 (D.C. Cir. 1996). Relying on these cases, subsequent courts uniformly have abstained from the adjudication of ministers' Title VII and ADEA claims. *See Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994); *Drevlow v. Lutheran Church*, 991 F.2d 468 (8th Cir. 1993); *Lewis v. Seventh-day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277

(5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999); *Pierce v. Iowa-Missouri Conference of Seventh-day Adventists*, 534 N.W.2d 425 (Iowa 1995), *cert. denied*, 517 U.S. 1220 (1996). The adjudication of such claims would inevitably chill the freedom of churches to choose those religious leaders best suited to their mission. This principle has been applied even where a religious reason has not been proffered for the termination, on the grounds that adjudicating the thorny questions of ministerial employment risks undesirable intrusion of civil authority into church affairs. *Rayburn*, 772 F.2d at 1169; *E.E.O.C. v. Catholic University*, 83 F.3d 455, 461, 464-65 (D.C. Cir. 1996); *Powell v. Stafford*, 859 F. Supp. 1343, 1349 (D. Colo. 1994).[7] As the *Rayburn* court noted, in "quintessentially

---

7. Although Clapper's brief does not address this point, this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), raises a potential issue as to whether the ministerial exception remains viable. In *E.E.O.C. v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996), the District of Columbia Court of Appeals addressed this issue squarely. The court held that *Smith* did not affect the

> long line of Supreme Court cases that affirm the fundamental right of churches to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

83 F.3d at 462. *Smith*, the court concluded, was inapposite because it dealt with the right of an individual to observe a particular command or practice of his faith. By contrast, the ministerial exception is designed to protect the freedom of the church to select those who will carry out its mission. In the case at bar, the District

(Cont'd)

religious" matters the "free exercise clause protects the act of the decision rather than a motivation behind it." 772 F.2d 1169. *See also Catholic University*, 83 F.3d at 464-65.

The ministerial exception first employed in *McClure* also applies to the non-ordained. In *Rayburn*, the Fourth Circuit held that the ministerial exception is not limited to ordained ministers but may be applied to lay employees of religious institutions.

> "[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship he or she should be considered 'clergy.' " (citations omitted).

(Cont'd)
Court concluded that the ministerial exception had survived *Smith* based on the *Catholic University* precedent. Pet. App. 25a-26a. The Court of Appeals' opinion is silent with respect to this issue.

More recently, an additional reason has arisen for doubting *Smith's* impact on the ministerial exception. Through the enactment of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 20000bb-4, Congress sought to restore the heightened scrutiny given statutes that threaten religious freedom. Although RFRA was found unconstitutional as to state statutes in *City of Boerne v. Flores*, 521 U.S. 507 (1997), there is now authority for the proposition that RFRA is constitutional when applied to federal statutes such as those at issue here. *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43, 142 L. Ed. 2d 34 (1998). Thus, to the extent that *Smith* weakened the doctrinal basis for the ministerial exception, RFRA resuscitated it.

> This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church . . .[8]

772 F.2d at 1169. *Rayburn* held that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." *Id.* The ministerial exception preserves the delicate balance between the government's legitimate interest in regulating the working conditions of its citizens and the need for religious autonomy. In declining to apply Title VII, the *Rayburn* court emphasized that the very threat of judicial inquiry could skew the selection process by compelling church officials to adopt risk-averse behavior that favors not those best suited to its mission, but those least likely to provoke litigation.[9] *Id.* at 1170-71.

Under the *Rayburn* test, not all employees of religious institutions are denied the opportunity to litigate employment discrimination claims, but only those whose role is inherently religious. *Rayburn* covers those whose

---

8. The *Rayburn* court cited with approval Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979). Professor Bagni explicitly anticipated, and endorsed, the ministerial exception's application to religious schools. *Id.* at 1545-46.

9. In another context, this Court noted yet another reason for declining to intervene in religious decision-making, namely the natural antagonism between the rational dictates of due process and the unreasoned imperatives of faith. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 714-15 (1976).

function is religious, recognizing that in many faiths formal ordination is not the touchstone of religious purpose. The Seventh-day Adventist educational system invests lay people with substantial religious responsibility. It does this because the Church founders possessed a firm conviction that education and religion were inextricably intertwined.[10] *Rayburn* assures the Church's ability to choose, without governmental interference, the persons charged with the essential task of inculcating religious values in young Seventh-day Adventists.

The *Rayburn* doctrine has been widely cited with approval and applied in a variety of contexts by federal and state courts.[11] Contrary to Clapper's suggestion, no federal

---

10. "In the highest sense the work of education and the work of redemption are one . . ." Ellen G. White, EDUCATION 30 (1903). This principle is repeated in the Education Code at § 1028: "The mission of the school and the Church are identical — redemption is the task." Pet. App. 5a.

11. *E.E.O.C. v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (Catholic nun in university theology department deemed "ministerial" for purpose of Title VII claim); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (seminary faculty treated as "clergy"); *Himaka v. Buddhist Churches of America*, 917 F. Supp. 698, 709 (N.D. Calif. 1995) (de-funding of Buddhist education department deemed a "ministerial" question beyond the reach of temporal courts); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (Roman Catholic high school theology teacher barred from litigating ADEA claim); *Welter v. Seton Hall University*, 608 A.2d 206, 214 (N.J. 1992) (employee's function rather than title determines whether courts should abstain from exercising jurisdiction); *Miller v. Catholic Diocese of Great Falls*,

(Cont'd)

circuit or state appellate court has repudiated its holding. The decisions in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) and *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993), cited by Clapper to sustain his position, are legally and factually inapposite.

Neither decision rejected, or even adjudicated, the ministerial exception test. Rather, each decision rests its analysis on this Court's doctrinally distinct *Catholic Bishop* construct. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). It is not apparent from a reading of the opinions whether the ministerial exception test was even raised by the parties. The approach employed by these courts does not suggest a split in the circuits so much as it suggests that factual differences may animate legally distinct forms of analysis. The ministerial exception was applied in neither case most likely because the churches failed utterly to present compelling facts sustaining its application.

Unlike Clapper, DeMarco was not responsible for teaching impressionable children in the lower grades, but instead taught high school math. He does not appear to have

---

(Cont'd)
Billings, 728 P.2d 794 (Mont. 1986) (free exercise clause bars adjudication of parochial teacher's claims of breach of covenant of good faith and fair dealing in discharge); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. App. Div. 1996) (role of principal at Catholic school deemed "ministerial"); *Jocz v. Labor and Industry Review Commission*, 538 N.W.2d 588 (Wisc. Ct. App. 1995) (director of field placement at seminary deemed "ministerial"); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988) (church organist deemed to be "clergy" and employment claims therefore barred).

been paid out of ministerial funds and he seems not to have been charged under church policy with the incorporation of religious values into the curriculum. He taught no theology or Bible as did Clapper. Pet. App. 9a. There was no evidence that he was required to be a church member, much less an active one. Similarly, the *Geary* decision offers scant evidence that application of the ministerial exception would have been appropriate. The only reference to a religious role in Geary's teaching was her "apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles." *Geary*, 7 F.3d at 331. Thus, in both cases the church's attempt to block the adjudication of the discrimination claim was not premised on the teacher's actual role in the church, the *sine qua non* of ministerial exception litigation, but rather on his or her mere status as a parochial school employee. Rather than demonstrate the circuit split claimed by Clapper, these cases only show that a too facile resort to the First Amendment is unlikely to garner judicial approval.

The weakness of the factual record in both of these cases may also account for the courts' resolution of the *Catholic Bishop* inquiry. In light of the minimalist showing of religious purpose, both courts concluded that the cases presented little risk of First Amendment infringement. Accordingly, the courts found it unnecessary to employ *Catholic Bishop's* prophylactic measures. Clapper would have this Court believe that this is evidence of a circuit division warranting grant of a writ. It demonstrates only how inapt is the comparison to *Geary* and *DeMarco*. Those defendants failed to muster evidence of infringement and the courts found none; Chesapeake Conference, by contrast, made such a showing and the court so found.

B. *Rayburn's* Application in this Case Does Not Warrant Grant of a Writ

The balance of Clapper's petition takes issue with the application of the ministerial exception to the facts of his case. This is simply not a proper issue for certiorari review.

The unpublished decision of the Fourth Circuit establishes no precedent. 4TH CIR. R. 36(b) and (c). Moreover, even if published, the decision's weight would be diminished by the very nature of ministerial exception jurisprudence which insists on factually intensive case-by-case analysis. *Weismann v. Congregation Shaare Emeth*, 38 F.3d 1038, 1044 (8th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 n.3 (8th Cir. 1991). In the case at bar, the lower courts both emphasized that their decisions were limited to the precise facts before them. Pet. App. 19a, 39a. Clapper improperly seeks this writ to jettison the discerning, semi-permeable fabric of this case-by-case approach for a crude First Amendment sieve.

Furthermore, the doctrine's application to Clapper's claim was appropriate in light of this Court's frequent recognition of the inherently religious function of sectarian schools,[12] as well as the unrebutted evidence of Clapper's

---

12. This Court has recognized consistently that parochial schools perform a vital part of the religious mission of a church. *See Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (parochial schools involve substantial religious activity and purpose and are a "powerful" vehicle for transmitting religious values; this is "enhanced by the impressionable age of the pupils, in primary

(Cont'd)

substantial religious purpose. Notwithstanding his post-judgment recantation, Donald Clapper served his Church in a religious capacity and, accordingly, his claims fall exclusively within ecclesiastical authority.

CONCLUSION

For all of the reasons set forth above, Clapper's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. RASCHKE
Counsel of Record
H. DEAN BOULAND
CATHERINE C. HESTER
LORI B. KISCH
BOULAND & BRUSH, LLC
Attorneys for Respondent
201 North Charles Street
Suite 2400
Baltimore, Maryland 21201
(410) 752-6000

(Cont'd)
schools particularly"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (the reason for religious schools is the propagation of a religious faith); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (the teaching process in religious schools "is, to a large extent, devoted to the inculcation of religious values and belief"); *Aguilar v. Felton*, 473 U.S. 402, 411-12 (1985) (elementary and secondary schools, unlike religiously affiliated colleges, are often "pervasively sectarian" and have as their "substantial purpose the inculcation of religious values"), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203 (1997).